Fischbach/Lord Electric Company *and* Jack L. Marsh

International Brotherhood of Electrical Workers, Local Union 112, AFL–CIO *and* Michael S. June *and* Robert Albert Knapp *and* Thomas E. McKenzie *and* Jack L. Marsh *and* Jimmy M. Scott. Cases 19–CA–15220, 19–CB–4486, 19–CB–4496, 19–CB–4501, 19–CB–4636, and 19–CB–4650

October 12, 1990

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

June 7, 1989, Administrative Law Judge David G. Heilbrun issued the attached supplemental decision in this proceeding.[1] The Respondent filed exceptions and a supporting brief. The General Counsel filed motions to strike certain of the Respondent's exceptions and its brief and also filed answering brief. The Respondent filed a response to the General Counsel's motions to strike.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board had considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified[4] and orders that the Respondent, International Brotherhood of Electrical Workers, Local Union 112, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Patrick F. Dunham, for the General Counsel.

David E. Williams and *Alex Skalbania (Critchlow & Williams)*, of Richland, Washington; and *Kenneth Pedersen (Davies, Roberts, & Reid)*, of Seattle, Washington, for Respondent Union.

SUPPLEMENTAL DECISION

I. INTRODUCTION

DAVIA G. HEILBRUN, Administrative Law Judge. On September 21, 1988, the National Labor Relations Board issued a Supplemental Decision and Order, partially granting General Counsel's pending Motion for Summary Judgment with respect to an amended backpay specification. By such action the Board narrowed matters still in controversy as to amounts of backpay due for discriminatees, as arising from a prior court-enforced Board Order.[1] Further, the hearing directed on these narrowed matters was expressly ''limited to the determination of a discriminatee's interim earnings, including the availability to the discriminatees of interim employment and their efforts to seek and retain such interim employment.''

[1] In the underlying unfair labor practice case, the Board found that the Respondent Union violated Sec. 8(b)(1)(A) and (2) by discriminating against the individual Charging Parties in hiring hall dispatch decisions. 270 NLRB 856 (1984), affd. in relevant part 827 F.2d 530 (9th Cir. 1987). Following receipt of the Respondent's answer to the amended backpay specification, the General Counsel filed a motion to strike the answer and motion for Summary Judgment. The Board granted the motions with respect to all allegations of gross backpay and to the formula for calculating net backpay. Concerning the Respondent's denial of the allegation of interim earnings, the Board, as recited by the judge, remanded the proceeding for a hearing limited to taking evidence on the alleged interim earnings of the discriminatees. 290 NLRB 1165 (1988).

[2] We deny the General Counsel's motion to strike the Respondent's brief. However, we grant the General Counsel's motion to strike Respondent's exception 5 (the licensing issue). With regard to exception 20 (the settlement issue), although we deny the General Counsel's motion to strike this exception, we note that in addition to two of the reasons set forth by the judge in sec. A,1 of the Conclusions and Disposition portion of his supplemental decision (the opposition of the General Counsel and the unreasonableness of the amount of money offered compared to the amount pled in the specification), we now also rely on a fact not known to us when addressing the request for special permission to appeal—that promptly on January 11, 1989, the second day of the hearing, the four discriminatees formally withdrew their consent prior to any execution of the previous day's agreeement. See *American Pacific Pipe Co.*, 290 NLRB 623 (1988).

Member Devaney, in the absence of execution of the proposed settlement, finds it unnecessary to pass on the Board's decision in *American Pacific*.

In exception 5 the Respondent contends that the failure of discriminatees Knapp and McKenzie to meet state licensing requirements is evidence of their deliberate attempts to remove themselves from the Washington State labor market for journeymen electricians and thus precludes their entitlement to backpay. We agree with the judge that issue has been fully litigated and finally resolved against the Respondent. See 290 NLRB 1165 at fn. 5. Further, we note that the Respondent's argument constitutes an implicit attack on the General Counsel's gross backpay formula as applied to Knapp and McKenzie (the earnings of those electricians dispatched in place of the two discriminatees). The exception is thus also untimely, given that the Board has already granted the General Counsel's Motion for Summary Judgment on the issue of gross backpay amounts due. We therefore grant the General Counsel's motion to strike exception 5.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge, for the reasons set out in sec. A,3 of the Conclusions and Disposition portion of his supplemental decision, that the Respondent is precluded from relying on any asserted deficiencies in the discriminatees' maintenance of registration on the hiring hall referral books during the backpay period. We further note that to do so would effectively allow the Respondent to challenge the gross backpay formula in the backpay specification subsequent to the Board's having granted the General Counsel's Motion for Summary Judgment on that issue.

In the first paragraph of sec. A,2 of the evidence portion of his supplemental decision, the judge inadvertently stated that Robert Knapp remained in the Richland, Washington area until approximately November 1982. As the judge later correctly found, Knapp left Richland for Texas early in July 1982.

[4] Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also deduct from the total amount due each claimant any tax withholdings required by Federal and state laws.

[1] The underlying case is reported at 270 NLRB 856 (1984). The Supplemental Decision and Order also noted earlier resolution by the parties of Case 19–CA–15220, resulting in the case caption contents of ''Fischbach/Lord Electric Company, Inc. and Jack L. Marsh, an Individual'' being retained only for purposes of consistency.

Each discriminatee has been a journeyman electrician for years preceding April 1982. Additionally each has maintained membership in a home local of the International Brotherhood of Electrical Workers (IBEW) from various times prior to 1982, warranting an identifying term ''traveler-electrician'' for purposes that relate to this proceeding and any associated liability to be assessed against Respondent. The backpay periods applicable to each discriminatee, to which particular ''excepted period(s)'' may also apply, are established as:

Michael June	4/1/82–12/31/83
Robert Knapp	4/1/82–3/31/84
Thomas McKenzie	4/1/82–7/1/82
Jimmy Scott	4/1/82–12/31/83

The matter was heard as a further supplementary proceeding in Richland, Washington, on January 10, 11, and 12, 1989.

II. EVIDENCE

A. *Examination of Discriminatees*

1. *Michael June*: This individual remained in the Richland area until mid-June 1982. He testified that during that time he periodically registered with Respondent's hiring hall, plus seeking work at the ''N Reactor'' and the ''FMEF'' Hanford facility. Additionally he obtained unemployment compensation because of knowing that he was ''very low'' on the hiring books. June had also worked as an electrician in various States prior to 1982. He once obtained work within a few days of learning about a 1980 Hanford area strike by returning to his home IBEW Local in Ashtabula, Ohio. June testified that he believed an IBEW member could obtain work at locals which were arranging hiring by actually going there.

June acknowledged that it was standard practice, and general knowledge, that local chapters of the IBEW had requirements such as those that were in place with Respondent. His general understanding, as held during the backpay period, was that a person seeking work out of a local had an obligation to resign the local's out-of-work book approximately at least every 30 days in order to reconfirm to the local that such person was available and still seeking work in the vicinity.

In the summer of 1982 June relocated to New York State where he ultimately found the employment now held. This followed brief employment in Erie, Pennsylvania, and contemporary out-of-work registration with several IBEW locals of Western New York State. Late that summer he also traveled to Colorado, Kansas, and Arizona seeking work, in the last instance making specific application to the Arizona Public Service Commission for its Salt River projects. The employment that ultimately concluded his backpay period evolved from being hired by Computer Sciences Corporation, a Virginia-based firm, for full-time work as a field superintendent at $25,000 annually in Buffalo, New York.

2. *Robert Knapp*: This individual remained in the Richland area until approximately November 1982. Knapp also testified that he had worked in numerous states during his career as an IBEW ''traveler,'' and that this resulted from his own desire to travel. He testified to variously searching for work before and after November 1982. Knapp testified he relied in part on a publication known as the ''CUTE'' letter. This served as a clearinghouse for electrical industry employment nationwide. He subscribed to it throughout the period of time for which he is now seeking backpay, because it provided information about jobs that were available for IBEW members throughout the country. Knapp described his normal method of seeking employment, as calling friends around the country to inquire about job prospects plus reliance on the CUTE letter.

Knapp stayed in the Tri-Cities area from the beginning of the backpay period on May 10, 1982, until sometime in July 1982, when he went to Dallas with his family, and soon found work. After being laid off there in August 1982, Knapp went to Beaumont, Texas, where his brother lived, remaining there for a period of approximately 3 months. Failing any job dispatch while in Beaumont, Knapp then moved to Florida in November 1982, where he worked for brief periods of time before being laid off again. Knapp then lived with family in Florida from December 1982 until returning to the Tri-Cities area in February 1983 for the trial of this matter. He remained in the area thereafter, living in a personally owned travel trailer and, according to his testimony, searching nearly daily for work. He did not leave the area again until the end of his backpay period in February 1984.

During this 1-year period Knapp testified to seeking work at nine prospective employers with whom he had contact during that period of time. No independent verification as to whether he had contacted the employers which he did identify was produced. Knapp denied taking vacations or being disqualified for employment from injury at anytime during his backpay period until he obtained the substantially equivalent employment held to the present time.

3. *Thomas McKenzie*: This individual has a backpay period comprising only the second quarter of 1982, but from which certain excepted periods apply leaving his total practical backpay span as 5 weeks from mid-April to late May. He testified that during this brief timespan he traveled from Richland into Montana and later into California seeking work. In the process he would register with IBEW hiring halls of the vicinities reached, and generally seek to find work through information available from friends within the industry. McKenzie's reference for this activity was the ''tramp guide'' listing for nationwide IBEW locals with useful information pertaining to each of them. He also testified to checking about work out of the Tri-Cities hall of the Iron Workers Union.

McKenzie testified to having a career as an IBEW journeyman wireman ''traveller,'' causing him to work ''practically clean across the United States in the process of his jobs.'' He testified to personally harboring a desire to travel which led to ''an agreement'' with his wife regarding this practice of traveling from place to place to obtain work.

McKenzie admitted to performing many home tasks during the first 3 weeks of his backpay period. After finishing these tasks McKenzie traveled to Montana to look for work on May 5 and 6, 1982. He then returned to the Tri-Cities, remaining until the latter part of May when he went to California. Neither trip resulted in finding work.

McKenzie testified that during the time that he was in the Tri-Cities during the backpay period he sought employment by ''looking for work around.'' However, he did not recall any specific employers to whom he had applied, nor did he

have any job applications that he testified to filling out during this period of time, claiming they had been destroyed in a fire. He also testified to having visited an Iron Workers local in the Tri-Cities area during this period of time, but could not identify it by number or location.

4. *Jimmy Scott*: Scott had also worked as an IBEW ''traveler'' in a number of States prior to 1982. Scott also subscribed to the ''CUTE'' letter, as well as a separate IBEW newsletter in which job information was carried. Scott did not seek work at IBEW locals outside the State of Washington during the backpay period, except for occasionally calling some out-of-state locals on the telephone. This individual remained in the Richland area until mid-1983.

Scott's primary explanations regarding his efforts to seek employment emphasized that he was on Local 112's out-of-work book during the backpay period, and that he had applied in Richland for sales and/or maintenance jobs. Scott listed 31 specific prospective employers where he had sought work during this 19-month period of time. However he did not produce any independent records that he had actually made application for jobs at these places of prospective employment. Moreover, Scott admitted that he did not have any previous job experience of any consequence in sales and/or maintenance areas of employment, and that he would have had to be trained to perform those types of jobs.

He testified that with financial assistance from a brother he traveled to his home State of South Carolina where he commenced residence at his parents' home and used that as a base for seeking work. Scott described registering at IBEW locals in the general vicinity and to obtaining short employment in South Carolina and in Augusta, Georgia. He later made contact through a local business agent to the IBEW in New York City, and from this obtained substantially equivalent employment which warranted a termination of his backpay period.

B. *Respondent's Witnesses*

George Elgin testified that he has been Respondent's established business manager, financial secretary, and general overseer of registration documents comprising the record of Respondent's past hiring hall procedure. He verified several features of hiring hall operations as existing during the years 1982 into 1984, including the existence of posted guidelines and the practice whereby registrants had to reconfirm their availability monthly. Elgin testified to having the ledger-type sign-in book and confirmation book of Respondent examined by dispatching employees of Respondent's office for purposes of this case.

Laurie Johnson testified that she has been a secretary in Respondent's office since at least 1982, and has actively participated in the hiring hall operations since that time. Johnson testified to the specifics of the reconfirmation practice as existing during years of the backpay periods, and to the rollback procedure whereby registrants would be relisted at the bottom of their particular hiring book after three occasions of unavailability for work by declination or failure of attempted contact. Johnson had examined hiring book one on which all discriminatees were signed at various times during their respective backpay periods, and testified from personal knowledge to the occasions when rollbacks occurred.

Contentions

General Counsel contends there has been no disturbance shown in the amount of backpay owed each discriminatee when controlling doctrine for compliance issues is applied. Specifically, General Counsel argues that the burden of proof carried by a Respondent with respect to the diligence of a search for work, or the existence of available work during relevant times, has not been remotely met in any instance here.

Respondent contends first that an accord and satisfaction had been achieved, which should have been, and now must be, recognized in resolution of these claims. Alternatively, Respondent argues both that available work in the Richland vicinity was shirked by the discriminatees, and that in each case their failure to achieve substantially more offsetting income was self-induced.

III. CONCLUSIONS AND DISPOSITION

A. *Preliminary*

1. Accord and satisfaction

In *American Pacific Pipe Co.*, 290 NLRB 623 (1988), the Board dealt with a claimed accord and satisfaction which was there argued by an employer defending against a backpay claim as ''barring litigation'' on the issue of its liability. The Board applied *Independent Stave Co.*, 287 NLRB 740 (1987), the thrust of which was described as follows:

> [We] recently held that in evaluating non-Board settlements the Board would examine all the surrounding circumstances including whether the Charging Party, the Respondent, and the discriminatee had agreed to be bound, and the General Counsel's position regarding the settlement; whether the settlement was reasonable in light of the alleged violation, the risks of litigating the issue, and the stage of litigation; whether fraud, coercion, or duress were present.

On this basis, and considering the facts in *American Pacific*, the Board offset backpay due the involved discriminatee by the amount paid as an intended accord and satisfaction. The Board pointedly wrote that the claimant and his union had ''voluntarily agreed'' to the exchange, that the parties executed their settlement agreement ''about a month before the backpay hearing began,'' and that the settlement was reasonable considering inherent uncertainties always present in litigation. Other collateral factors were also noted in passing. In so holding the Board expressly overruled *Michael M. Schafer*, 261 NLRB 272 (1982), and *Stevens Ford*, 271 NLRB 628 (1984), to the extent inconsistent.

Here circumstances of the ''settlement'' so earnestly claimed by Respondent were in the nature of a continuum spanning both days of hearing. The distance from which these four discriminatees assembled, the tendering of more than simple business records for their attention, and the final unanimous position taken by the group that the amount offered, singly or collectively, was inadequate in their view, represents a highly distinguishable situation from that of *Independent Stave*. These factors, coupled with General Counsel's resolute opposition to the settlement, creates a failure of Respondent's efforts to meet freshly declared stand-

ards in matters of this kind. Notably the Board wrote in *American Pacific* that the ''amount of money'' is at least ''one of the many factors to be considered'' in a determination of whether to honor a private agreement between parties. *Independent Stave.* The extraordinary direct rationale of *American Pacific* plainly overrides any contrary implications as contained in the BNA treatise edited by Charles J. Morris, and *Central Cartage Co.*, 206 NLRB 337 (1973), a case that is readily distinguishable. Accordingly, I reaffirm my refusal to approve this settlement agreement by which $125,000 was assured for payment, and thus treat the claimed liability of Respondent strictly on the limited issue stressed by the Board in its Supplemental Decision.

2. Licensing

The first of two subsidiary points made by Respondent concerns the lack of State of Washington electrician licenses on the part of both Knapp and McKenzie during the backpay period. In footnote 3 of its basic Decision and Order the Board addressed this point, saying that in raising the subject Respondent was ''vague'' and ''not [even] credible.'' As a result the Board held that the ''licensing requirement was not a factor'' in the assessment of whether unfair labor practices had been committed. The situation plainly constitutes res judicata as to this defense, and on that basis I must reject Respondent's argument as so premised.

3. Hiring hall

It is equally unavailing for Respondent to argue that each discriminatee failed to seek, or failed to remain eligible for, work that might have materialized via the hiring hall procedures of registration, maintainence of current status, availability when called, and the general dispatching pattern after requisitioning of wiremen by employers. Here the testimony of Elgin, and the detailed recapitulations of Johnson, must subordinate to the legally settled conclusion that none of the four individuals could expect, or would receive, fair and lawful processing through the hiring hall. Again, therefore, this entire avenue fails to assist Respondent in meeting its burden of proof on the limited issues present. The fact that various discriminatees tried Respondent's hiring hall during their backpay period would not constitute a waiver of rights or binding condonation of what has been judicially declared as illegal. Here, too, Respondent meets the blocking effect of res judicata principles.

B. *Central Issues*

There is a common thread to a threshold, or tentative, view of the nature of undertakings by each claimant following the generally collective experience of discrimination against them all in the eventful spring of 1982. That is their personal views on how to progress through life in a personal, family, occupational and financial sense. In each case an ambulatory, practically nomadic, history was shown; with each discriminatee given to, comfortable with, and having seen success in, a darting, questing, dogged style of locating, assuring and fulfilling work in their trade. In this process the entire country was their job market, both from the standpoint of where and how they spent younger years, and in terms of past employment, brief or long-term, acquired and completed. In this sense any standard of behavior, or more particularly diligence as the law would require in any situation, must take into account these allowable individualities. Further, the perhaps quaint utility of the CUTE letter, and the vagaries inherent in word-of-mouth, ''grapevine-type'' leads to where an experienced wireman might find rewarding work, are at least appropriate to each claimant's normal efforts and expectations. I couple these preliminary observations with a blanket credibility assessment that each discriminatee appeared by their testimony to be earnestly and honestly recounting the facts and motivation of their required search for interim employment.

It is well-established that a Respondent may mitigate its backpay liability by establishing how backpay claimants ''willfully incurred'' losses by ''clearly unjustifiable refusal to take desirable new employment.'' *Phelps Dodge Corp. v. NLRB*, 313 U.S. 117, 199–200 (1941). To establish such mitigation the applicable burden is to demonstrate that the individual ''neglected to make reasonable efforts to find interim work.'' *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966). Success is not the test of sufficiency in a discriminatee's search for interim employment. Rather, the law ''only requires honest good faith effort.'' *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955). A summarizing statement reads: While the evidence may leave a question of whether [the backpay claimant] could have been more diligent in seeking other employment, the highest standard of diligence is not required and doubts must be resolved against Respondent.'' *Otis Hospital*, 240 NLRB 173 (1979). In determining if a backpay claimant made reasonable search for employment, the entire context of the claimant's search over the backpay period must be considered *Highview, Inc.*, 250 NLRB 549 (1980); *Saginaw Aggregates*, 198 NLRB 598 (1972); *Nickey Chevrolet Sales*, 195 NLRB 395 (1972). Uncertainty in the evidence is to be resolved against the wrongdoer. *NLRB v. Miami Coca-Cola Bottling Co.*, supra.

Here each discriminatee made logical, appropriate and prudent efforts to mitigate the damages flowing from Respondent's discrimination against them. If these efforts were less than urgent, spotty as to venturing outside their accustomed patterns, or unimaginative, these characteristics do not offset the essential sincerity of their search. A wide geographical area was used in each case, and a necessary balance struck between family and career needs. Overall there was a permeating earnestness to each discriminatee's efforts, and if this assessment is shaky with regard to McKenzie, his situation was of such short duration that principles of allowable readjustment take up any slack. The evidence sufficiently also shows that employment opportunity was more limited during the general 1982–1984 timespan than during earlier instances of job acquisition to which Respondent points. This condition was markedly so in the Tri-Cities area from the credited evidence, and was persuasively shown to have also been found in other regions of the country to which the job searches were carried. Cf. *Delta Data Systems Corp.*, 293 NLRB 736 (1989); *L'Ermitage Hotel*, 293 NLRB 924 (1989).

Accordingly, I find in terms of the Board's limiting direction for hearing that no evidence has been convincingly advanced to warrant diminishing backpay due any of the four claimants. As plainly outlined in the amended backpay specification this includes amounts due in unpaid contributions to

the national electrical benefit fund (NEBF), and the value of assets distributed in the course of its dissolution.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Each individual shall be paid by Respondent Union, its officers, agents, and representatives, the amounts respectively shown below after their names, plus further interest as accumulating and owing at the time of payment.

Michael S. June	$90,188.89
Robert Albert Knapp	76,704.33
Thomas E. McKenzie	5,013.41
Jimmy M. Scott	69,923.52